No. 76-130

In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

MITCHELL P. KOBELINSKI, ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-51a) is reported at 533 F. 2d 668. The order of the district court (Pet. App. 20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1976. A timely petition for rehearing was denied on May 3, 1976 (Pet. App. 52a). The petition for a writ of certiorari was filed on July 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commonwealth of Pennsylvania has standing on its own behalf or as *parens patriae* to challenge the administration of a disaster relief program by the Small Business Administration.

STATEMENT

In June 1972, several eastern states, including Pennsylvania, were ravaged by the destructive winds and rain of Hurricane Agnes. President Nixon quickly designated Pennsylvania, Maryland and Virginia major disaster areas,[1] thereby making those states available for special assistance from the Small Business Administration.[2] On June 27, 1972, the SBA announced that it would furnish disaster relief to the devastated areas. 37 Fed. Reg. 13838. The SBA determined that relief efforts in the stricken areas should be directed locally rather than from Washington. It therefore announced that all of the affected areas, including Pennsylvania, would be classified as "Class B" disaster areas. Under the "Class B" designation, relief efforts were coordinated and supervised by the

[1]The designation was made pursuant to the provisions of the Disaster Relief Act of 1970, 84 Stat. 1745, 42 U.S.C. 4402(1). This Act has been supplanted by the Disaster Relief Act of 1974, 88 Stat. 143, 42 U.S.C. (Supp. IV) 5121 *et seq.*, which contains a similar authority for the designation of major disaster areas. 88 Stat. 144, 42 U.S.C. (Supp. IV) 5122(2).

[2]The assistance was made available pursuant to the provisions of 42 U.S.C. 4451 and 15 U.S.C. 636(b). The former provision is now codified at 15 U.S.C. (Supp. V) 636a. Under these provisions, the SBA is authorized to grant emergency loans to individuals and corporations who suffer property losses as the result of major disasters. See 13 C.F.R. 123.1.

SBA regional director in whose region the disaster took place.[3] Pet. App. 23a.

Dissatisfied with the manner in which SBA administered the disaster relief, and in part to enjoin discontinuance of such assistance, petitioner Commonwealth of Pennsylvania on January 3, 1974, filed this action on its own behalf and as *parens patriae* on behalf of all its citizens, alleging that the "Class B" designation was both arbitrary and illegal (Pet. App. 23a-24a). It was alleged that as a result of such classification Pennsylvania and its citizens had not received the necessary "professional S.B.A. personnel and administrative resources to effectively administer and deliver disaster recovery assistance * * *" (Pet. App. 7a).

Respondents filed a motion to dismiss on the ground that petitioner lacked standing to sue the United States either on its own behalf or as *parens patriae* (Pet. App. 24a). The district court dismissed the complaint "for lack of standing" (Pet. App. 20a). The court of appeals affirmed (Pet. App. 22a-51a).

[3]Prior to October 1972, the SBA employed two different methods for administering disaster relief. Under the first method, the "Class A" designation, relief aid was administered under the direction of the SBA Associate Administrator for Operations and Investments, Washington, D.C. Under the second method, the "Class B" designation, relief was administered under the direction of the SBA regional director in the area where the disaster occurred. The delegations of authority pertinent to the designations are published in the Federal Register. 36 Fed. Reg. 7290. The delegations of authority have no bearing on the amount of assistance provided to the stricken areas (Pet. App. 44a, n. 60), or on the priority assigned to the delivery of such assistance.

Since 1972, all disaster relief administered by the SBA has been handled by regional directors, that method of supervision having been found to be more efficient (Pet. App. 45a, n. 60).

ARGUMENT

1. In rejecting petitioner's[4] claim to standing based upon alleged injury to its proprietary interest (Pet. 13-15), the court of appeals correctly applied the test elucidated in *Data Processing Service* v. *Camp*, 397 U.S. 150, and *Warth* v. *Seldin*, 422 U.S. 490. As the court of appeals pointed out (Pet. App. 27a), petitioner's alleged injuries—that its ability to fulfill duties owed its citizens had been impaired and its tax revenues reduced—"do not satisfy the requirement of being arguably within the zone of interests protected by the Small Business Act."[5] The court reasoned (*ibid;* footnotes omitted):

> Unlike many federal assistance programs, no aid is authorized to be channelled through state agencies or coordinated with state programs. Nor do we find anything in the legislative history of the Act to indicate any concern for the well-being of the states as distinct political units.[6]

SBA's authority to grant disaster assistance extends to all victims of disasters who suffer damage or loss to their

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[4]We use "petitioner" throughout to refer to petitioner Commonwealth of Pennsylvania.

[5]The court also expressed doubt about whether the alleged injuries themselves were sufficient injuries in fact (see Pet. App. 28a-29a). The court found no nexus between the challenged administration and any impairment in petitioner's ability to care for its citizens or reduction in its revenues.

[6]The Ninth Circuit's decision in *Washington Utilities & Transportation Commission* v. *Federal Communications Commission*, 513 F. 2d 1142, is not to the contrary. There, an agency of the State of Washington was held to have standing on its own behalf to challenge an administrative decision of the Federal Communications Commission. But that case involved different allegations of injury under a different statute creating a different zone of interests. See p. 8, *infra*.

physical property. See 13 C.F.R. 123.1(a). The court of appeals incorrectly thought that relief was furnished only to small business concerns (see Pet. App. 27a). But the court's failure to recognize that individuals as well as businesses are protected by the disaster relief provisions does not detract from the validity of its conclusion that the Act was not designed to preserve any separate interests of the states in their political capacities.

2. The court of appeals, in a scholarly opinion upon which we principally rely (Pet. App. 29a-47a), correctly held that overriding concerns of federalism preclude recognition of petitioner's standing as *parens patriae* to challenge the administration of disaster relief by the Small Business Administration. The court acknowledged that the states may in some circumstances sue as *parens patriae* to defend certain causes in which they have a quasi-sovereign interest (Pet. App. 30a-35a). Standing to bring such suits depends in large part, however, on the identity of the defendant parties (Pet. App. 35a-42a). States may sue one another in *parens patriae* capacity, but different considerations pertain when the suit is against the federal government (Pet. App. 37a-38a):

> The individual's dual citizenship in both state and nation, with separate rights and obligations arising from each, suggests that both units of government act as *parens patriae* within their separate spheres of activity. The general supremacy of federal law gives some reason to conclude that the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens. In the terms used by the *parens patriae* cases, the state can not have a quasi-sovereign interest because the matter falls within the sovereignty of the Federal Government.

> The Supreme Court has repeatedly recognized (as a factor governing state standing) this interest of the Federal Government in the exclusivity of its *parens patriae* powers. The first and still dominant case in the field is *Massachusetts* v. *Mellon,* [262 U.S. 447] * * *.

See *Georgia* v. *Penn. R.R. Co.,* 324 U.S. 439, 447-448; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 324; *Jones, Governor, ex rel. Louisiana* v. *Bowles,* 322 U.S. 707. See also Bickel, *The Voting Rights Cases,* 1966 Sup. Ct. Review 79, 89.

In *Massachusetts* v. *Mellon,* 262 U.S. 447, 485-486, the Court denied Massachusetts standing to sue a federal official on behalf of its citizens, holding:

> While the State, under some circumstances, may sue [as *parens patriae*] for the protection of its citizens (*Missouri* v. *Illinois,* 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.[7]

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[7]Petitioners would have this Court limit the holding in *Massachusetts* v. *Mellon* to cases involving challenges to the constitutionality of a federal statute. But such a limitation cannot be inferred from the Court's language, nor can it be found in any subsequent opinions of this Court. Furthermore, the distinction petitioners draw is not logical. If the states cannot challenge the federal government in areas where it is not competent to act (as may be the case if Congress passes an unconstitutional law), then certainly the states cannot challenge federal actions in areas that properly fall within federal authority. Moreover, if avoiding

Petitioner's suit challenging the administration of the SBA program constitutes a substantial interference with the federal government's own representation of its citizens' interests. Petitioner challenges the internal procedures used by a federal agency in administering a federal program for the aid of individuals and small businesses, "matters traditionally reserved to broad agency discretion" (Pet. App. 44a-45a). Petitioner sought to interject itself into the operation of the federal program, to insert itself "between the national government and the legitimate objects of [federal] administrative authority" (Pet. App. 43a). As the court of appeals stated (Pet. App. 45a-46a; footnote omitted):

> [I]t is difficult to imagine how a state could more substantially intrude itself into the operations of the Federal Government than by challenging agency activity on the sole basis that the agency chose to structure its effort in a particular way. The depth of this attempted invasion of matters traditionally reserved to broad agency discretion weakens any claim of the state that it is a proper *parens patriae* representative of its citizen's interests in this matter.

The court of appeals therefore correctly concluded that "[i]n the face of the ambiguous state interest alleged by Pennsylvania, it seems clear that the state disruption of federal action implicit in granting state standing can not be tolerated here" (Pet. App. 43a).

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disruption of the federal government is a factor militating against these state actions, the disruption is likely to be equally great in nonconstitutional cases. See Pet. App. 41a, n. 56. See also *State of Minnesota ex rel. Lord* v. *Benson,* 274 F. 2d 764 (C.A. D.C.); *State of Idaho ex rel. Robson* v. *First Security Bank,* 315 F. Supp. 274 (D. Idaho).

This result does not conflict with the holding in *Washington Utilities & Transportation Commission* v. *Federal Communications Commission, supra.* That case was considered by the court of appeals, which noted that "it is distinguishable from our case in at least one important respect" (Pet. App. 47a). The court explained (*ibid.*; footnote omitted):

> It was an action by a specialized utility regulating agency of the state, dealing with matters within the expertise of that agency. The specialization of such an agency arguably befits it to stand in a *parens patriae* capacity for the citizenry on matters falling within its statutory mandate. It is conceivable that the agency's expertise [made] it the best available representative of the plaintiff interests involved, and that the close interaction of state and federal regulation in the communications field renders less substantial the federalism interest in freedom from state intrusion. Thus even were the Ninth Circuit decision binding upon us, it would not compel a conclusion different from the one we have reached.

Moreover, in *Washington Utilities & Transportation Commission,* the Ninth Circuit noted that "any adverse impact of the FCC order on intrastate telephone rates would probably be so indirect, and take place so gradually, that individual users of intrastate telephone service would be unaware of it, or, in any case, would have inadequate incentive to incur the expense of judicial review." 513 F. 2d at 1152. In contrast, the interests petitioner seeks to represent—those of individuals who suffered substantial, discrete injuries as a result of Hurricane Agnes—are "no more than a reflection of injuries to the 'business or property of [individuals], for which they may recover themselves * * * ." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264.[8]

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[8]Furthermore, the holding with respect to *parens patriae* standing in *Washington Utilities & Transportation Commission* was in the nature of *dictum*, for the court had already held on the basis of the peculiar facts there that the state agency "has standing in its own right to secure judicial review of this FCC order." 513 F. 2d at 1152. As Judge Wallace said, in his concurring opinion, "the *parens patriae* reasoning [is] unnecessary to decide this case * * * ." 513 F. 2d at 1169.

3. In any event, further review of petitioner's standing claims is not warranted in view of the insubstantiality of its underlying contention: although petitioner's suit is based upon the allegation that it and its citizens were entitled to a "Class A" designation in the wake of Hurricane Agnes, petitioner's complaint does not contain a single factual allegation showing how the "Class B" administrative designation operated to its detriment or the detriment of its citizens. To the contrary, that designation in no way detracted from the effective and expedient delivery of disaster relief. See Pet. App. 44a-45a, n. 60. Furthermore, the underlying issue presented has no prospective significance: the distinction in administrative designations between "Class A" and "Class B" disaster areas was abolished in October 1972 (see note 3, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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